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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. [redacted] 102

THE JAMES BLACKSTONE MEMORIAL LIBRARY ASSOCIATION, *et al.*,

Petitioners,

v.

GULF, MOBILE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	3
ARGUMENT	14
I. The Decision in this Case Is Not in Conflict with the Decisions Cited by Petitioners	14
(a) *La Buy* v. *Howes Leather Co.*, 352 U.S. 249	14
(b) *Speed* v. *Transamerica Corp.*, 235 F. 2d 369	17
(c) *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 206 F. 2d 495	19
(d) *Dunnett* v. *Arn*, 71 F. 2d 912; *Hughes* v. *Securities and Exchange Commission*, 139 F. 2d 434; *Norris & Hirshberg, Inc.* v. *Securities & Exchange Commission*, 177 F. 2d 228	20
(e) Alton Plan of Reorganization	21
II. The Decision Does Not "Conflict with the Unmistakable Trend of the Decisions of All the Federal Courts in This Century"	23
CONCLUSION	28

CASES CITED

Dunnett v. *Arn*, 71 F. 2d 912	20
Friedman v. *United States*, 168 F. Supp. 815, 339 U. S. 205	23
Hughes v. *Securities and Exchange Commission*, 139 F. 2d 434	20
La Buy v. *Howes Leather Co.*, 352 U.S. 249	2, 3, 14, 15
Norris & Hirshberg, Inc. v. *Securities & Exchange Commission*, 177 F. 2d 228	20
Slater v. *G.M.&O.*, 307 N.Y. 419, 121 N.E. 2d 398	8
Speed v. *Transamerica Corp.*, 235 F. 2d 369	17, 18, 19
Western Pacific R.R. Corp. v. *Western Pacific R.R. Co.*, 206 F. 2d 495	19

IN THE

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NO. 986

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GULF, MOBILE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The fourteen-page opinion of the Court of Appeals is not appended to the Petition, but it is set out following page 173 of the document entitled "Appendix to Brief of Plaintiffs-Appellants" and is reported at 264 F. 2d 445.

The Petition for a writ of certiorari is predicated upon an alleged conflict between that decision and certain decisions of this Court and of other courts. The opinion of the Court of Appeals, however, shows that no such conflict exists and that this case and the cases cited by Petitioners were decided upon precisely the same principles of law.

Both the District Court and the Court of Appeals, which unanimously affirmed the decision of the District Court, stated and applied the rule followed in the cases to which Petitioners refer, namely that a majority stockholder has

a fiduciary duty to disclose all material facts affecting the value of minority shares before purchasing those shares (A.[1] 147, 163, 164; Opinion, pp. 6, 8). After detailed consideration of the evidence of this case, however, those courts found that the Respondent (majority stockholder) had concealed no material facts from Petitioners (minority stockholders) and that Petitioners had possession of all the facts relevant to a determination of the fair value of the stock (A. 151, 163, 164; Opinion, pp. 8-13). The differences between this case and the cases cited by Petitioners are in their facts and not in the legal principles.

On the basis of the facts of this case, the decree affirmed by the Court of Appeals found expressly that:

> "Defendant did not violate the provisions of Rule X-10B-5 promulgated by the Securities and Exchange Commission pursuant to Section 10B of the Securities and Exchange Act of 1934, 15 U.S.C.A. 78(j)(b)." (A. 153, 163, 164)

Petitioners' assertion that the decision conflicts with other decisions by failing to give paramount effect to the Federal Securities and Exchange Act and the Regulations of the Securities and Exchange Commission is completely unfounded. Full effect was given to the Act and the Regulations, but the facts proved that there had been no violation.

The absence of the alleged conflict with *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, is apparent from the fact that the decision which was affirmed in that case was from the same Court of Appeals which unanimously decided this later case. The District Court, on its own motion, had referred this proceeding to a special master, who heard the

1. The letter "A" refers to the Appendix to Brief of Plaintiffs-Appellants. The Supplemental Appendix of Defendant-Appellee is referred to herein as "SA."

testimony, analyzed the voluminous depositions and exhibits and reported his recommended findings and conclusions. Denying Petitioners' effort to shift the cost of that reference to the Respondent, the Court of Appeals reviewed the record and found that "at no point did they object" to the reference (Opinion, p. 14). Instead of objecting and moving to vacate, Petitioners had submitted their case to the special master. The decision here in no way conflicts with *La Buy*, where timely objections were made and motions to vacate were filed and where there had been no participation in a proceeding before the master.

Under a claim of conflict with other decisions, Petitioners merely seek an additional review of the evidence concerning the factual determinations of the District Court which were unanimously affirmed by the Court of Appeals. The case is not an appropriate one for certiorari, since it represents an application of recognized legal principles to the facts of a particular controversy. Moreover, the factual determinations made below were firmly supported by the evidence. The Petition presents no valid ground specified in Rule 19 for the issuance of the writ.

STATEMENT OF THE CASE

The Court of Appeals summarized the nature of the case at the outset of its opinion as follows:

> "This action was commenced November 4, 1953, by former minority stockholders of Joliet & Chicago Railroad Company (herein called Joliet) against the Gulf, Mobile & Ohio Railroad Company (herein called Gulf), to whose subsidiary (Gulf, Mobile & Ohio Land Company) plaintiffs, on or about February 14, 1950, sold 4,312 shares of stock of Joliet at a price of $240.00 per share. The stock was so-called guaranteed stock, all of the property of Joliet (a railroad line between Joliet

and Chicago) having been leased in 1864 to Chicago and Alton Railroad Company (herein, with successor corporations, called Alton), under a perpetual lease. This lease was assumed by Gulf in 1947 in connection with the Alton reorganization proceeding in the district court for the Northern District of Illinois.

"The complaint sought damages of varying amounts up to the difference between $240.00 per share, the receiving price, and $1,087.70 per share, for total damages of $3,659,594.00. Plaintiffs' claim was based on Gulf's alleged stoppage of guaranteed dividend payments on plaintiffs' stock prior to purchase, and Gulf's failure, when purchasing plaintiffs' stock, to disclose material facts affecting its value in violation of Gulf's fiduciary obligations, by which Gulf was enabled to reap large profits at plaintiffs' expense. Jurisdiction is asserted upon diversity of citizenship and upon a violation of Section 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C.A. 78j (b)." (Opinion, pp. 1-2)

With reference to the perpetual lease of Joliet's property, the opinion stated in part as follows:

"As rent under the lease Alton [a predecessor of Gulf] covenanted to guarantee and pay to the holders of Joliet's 15,000 shares of stock an annual dividend of seven percent upon the par value of the stock, or $7.00 per share, payable quarterly." (Opinion, p. 3)

The Court of Appeals quoted and approved the following conclusion of the special master, which had been adopted by the District Court:

"'Joliet stockholders, in the event of a sale of part of Joliet's property during the term of the lease, would derive no benefit from such a sale, even though made at a great profit, because their dividend was limited to $7 per share.'" (Opinion, p. 11)

In its description of the facts, the Court of Appeals stated:

> "Thus, the situation of plaintiffs as shareholders of Joliet was in marked contrast to that of shareholders in the ordinary case who own the corporate assets subject to its liabilities, and where any enhancement of the value of the corporate assets results in a pro-rata increase in the value of their shares." (Opinion, p. 12)

The alleged stoppage of dividend payments arose out of the exercise by Gulf of a right which had been specifically reserved to it in the Alton reorganization plan and the lease assumption agreement of 1947. That agreement, which had been reviewed and approved by the Interstate Commerce Commission and by the District Court in the Alton reorganization proceedings, stated that Gulf "reserves the right * * * to contest liability for the payment of taxes under the Joliet lease * * *" (Opinion, p. 5). Pursuant to that provision, Gulf, the lessee, refused to pay Joliet's federal income taxes. Gulf at all times made payments of the $7 dividends currently, but they were not received by Joliet's stockholders, since the government seized the dividend payments to satisfy Joliet's unpaid income taxes.[1] In 1949, in a suit brought by certain ones of the Petitioners, the District Court held Gulf obligated, under the lease, to pay the Joliet income taxes in addition to the dividends, and in February, 1950, while an appeal was pending, Petitioners sold all their Joliet stock.

After reviewing the circumstances concerning the alleged stoppage of dividend payments, the Court of Appeals stated:

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1. The footnote on page 5 of the Petition says that "The opinion below states: 'for some reason not discernible * * * dividend payments were stopped.'" This is misleading, the quotation having been constructed by Petitioners by combining parts of two separate sentences (Opinion, p. 5).

"The purchase price of $240.00 per share included all rental payments which had been withheld by Gulf. The special master and the court below reviewed the facts in this connection and concluded that 'those matters are not relevant to the issue in the present case as they had no effect upon plaintiffs' judgment when plaintiffs sold their Joliet stock in February, 1950, and plaintiffs were fully informed as to such matters before they sold their stock.' With this conclusion we agree." (Opinion, pp. 5-6)

The rule of law by which the conduct of Gulf in purchasing plaintiffs' minority shares of Joliet was tested and approved in this proceeding was the most exacting of all possible rules that have been suggested for application against a majority stockholder in connection with a purchase of minority shares. The opinion of the Court of Appeals states:

"The real issue in the case arises from the alleged failure of Gulf to adequately inform plaintiffs of material facts which plaintiffs contend, if known by them, would have greatly enhanced the selling price of their shares. As to the duty of Gulf, the master found:

'As the defendant in February 1950 was the owner of substantially more than a majority of Joliet stock, there was a fiduciary relationship between defendant and the plaintiffs, minority stockholders of Joliet.

'This fiduciary duty required defendant in negotiating for the purchase of plaintiffs' Joliet stock to make complete disclosure of all material facts affecting the value of such stock before purchasing it from them.'" (Opinion, p. 6)

Under this strict standard, the courts below carefully reviewed the evidence in detail and found the issues for

Gulf. The Court of Appeals unanimously affirmed the decree of the District Court, including the following:

> "129. The figure of $240 per share for Joliet stock arrived at as a result of the negotiations prior to February 10, 1950, was arrived at after fair, arm's-length bargaining; defendant concealed no material facts from the plaintiffs and plaintiffs were in the possession of all the facts relevant to a determination of the fair value of the stock." (A. 151-152, 163, 164)

Referring to the cases relied on by Petitioners, the Court of Appeals stated:

> "These cases furnish support only for the proposition that majority stockholders of a corporation occupy a fiduciary relationship toward minority stockholders and, when purchasing their shares, are under an obligation to divulge all material facts." (Opinion, p. 8)

The fact that the evidence here showed that all material facts were known to the sellers, whereas the evidence in other cases as to other transactions showed that material facts were concealed, does not create a conflict between the decisions. The facts of this case have been reviewed by the Master in Chancery, by the District Court and by the Court of Appeals, and all have agreed that there is no factual basis for Petitioners' claim. No conflict with other decisions exists nor are there any important federal questions involved. While we will describe the facts in more detail below, it is not the office of the writ of certiorari to afford an additional review of the evidence as to the facts in a particular private controversy, and this salutary rule is especially appropriate where the Master in Chancery, the District Court and the Court of Appeals have all ar-

rived at the same conclusion after reviewing the evidence.[1]

Petitioners' claim as to allegedly undisclosed facts concerns a sale from Gulf to the government in September, 1951, of certain real estate in Chicago known as the Harrison Street property, to be used for post office facilities.[2] This was a year and a half after Petitioners had sold their Joliet stock, and more than a year after the Joliet lease had been terminated and Joliet had been dissolved. A portion of that real estate had formerly been included under the Joliet lease, but most of it had never had any connection with Joliet and, instead, had been owned outright by Gulf and its predecessor, Alton (Opinion, p. 6). The property was sold at a loss, the price received by Gulf being far below the book value of the property (SA. 338). By reason of the perpetual lease of all Joliet property, the courts below found, and Petitioners' principal witness conceded, that Joliet's stockholders would have received no part of the proceeds of sale even if the sale had been made before Joliet's dissolution and before Petitioners sold their Joliet stock (Opinion, pp. 11-12).

Petitioners erroneously assert that the sale was made at a profit and that in February, 1950, when they sold their Joliet stock, the sale was "approaching consummation" (Pet. 22); that "Gulf could have accepted the Government's lowest offer at any time and still made almost as

1. The present suit is the second one in which fraud has been charged in connection with acquisition of stock of leased lines in the Alton system. The first one, in which the plaintiffs were represented by the same counsel who represents Petitioners, concerned acquisition by Gulf of stock in another leased line. Like this case, it terminated in a decision that there was "no factual basis" for the charge. *Slater* v. *G. M. & O.*, 307 N.Y. 419, 121 N.E. 2d 398 (1954).

2. The 37 mile line of Joliet, between Chicago and Joliet, Illinois, has continued in operation as part of the Gulf railroad system.

huge a net profit" (Pet. 23); that "Gulf knew at all times that it could make a highly profitable sale to the Government" (Pet. 27); and that "We have seen that January [1950] was the month when a very quick closing was expected" (Pet. 41). The facts of record contradict these extravagant assertions. The evidence showed that the real estate in question was not sold at a profit but, instead, was sold for substantially *less* than the value at which it had been carried on the books of these railroads (SA. 338). The record also shows that at the time when Petitioners sold their Joliet stock, the government had made no offer for this real estate. It shows, instead, that the government was actively examining other sites for the possible purchase and that the government continued its active search for and review of various possible sites both before and long after February, 1950, without any determination as to which one would eventually be selected.[1] The Court of Appeals reviewed the evidence and stated, in part, as follows:

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1. Petitioners refer to the contents of an internal report by Post Office officials in December, 1949, indicating favorable consideration of the Gulf site (Pet. 10, 45, 46) without mentioning that the evidence showed unequivocally that Gulf had no knowledge of the report until Petitioners obtained it from government files for the purposes of this case. (Findings 91, 92, A. 140) Moreover, in the language of the Public Buildings Administration Report of January 31, 1950, "no determination had been made as to any property • • •" and "A search for other locations further south, both on the east and the west side of the river is being continued" (SA. 314-315). In March and April, 1950, the government was reviewing eight possible sites (SA. 316-321, 335, 336) and was giving particular attention to a Soo Line site (SA. 316-318). In the language of the government report of May 29, 1950, the studies of the various possible sites were "still in the preliminary state" (SA. 323). In June, 1950, the government was "looking at several different sites as possible locations for post office facilities" (testimony of Hon. W. E. Reynolds, Commissioner, Public Buildings Service [formerly called Public Building Administration] of General Services Administration, SA. 68).

Petitioners' theory of the facts is contrary to the express testimony of the witnesses (including former Commissioner Reynolds of General Services Administration), contrary to the exhibits from government files referred to in Finding 112, quoted above, and contrary to the factual determinations made by the master, the District Court and the Court of Appeals. It is apparent from the evidence that, at the time when Petitioners sold their Joliet stock, neither Gulf nor anyone else knew that the government would eventually conclude its search for sites by selecting the Gulf property nor could anyone have known at that time what price would be paid for the property if the government selected it.[1]

The Petition contains numerous statements which are unsupported either by the findings of the courts below or by the evidence. Many of these statements result from attributing knowledge to Gulf, in early February, 1950, of all the events that did not happen until the late fall of 1950 and 1951. For example, the Petition states at page 27 that "Gulf knew on February 10, 1950 that by acquiring all Joliet's stock and dissolving Joliet before consummating the sale, it would acquire a tax-loss of about two and a half million dollars, which would be realized as soon as it completed the sale." Neither at this page nor elsewhere in the Petition is there a reference to the record to support that allegation. There is not a shred of evidence to that effect, and, instead, the evidence and the findings of fact were to

1. Gulf first offered the property to the government on April 11, 1950, at a price corresponding to an appraisal which it had received after Petitioners had sold their Joliet stock (SA. 21, 256, 261). That offering price was at about the book value. In October, 1950, when the government first determined to acquire this property, the government and Gulf were far apart as to price and the ultimate price was not arrived at until 1951, after further appraisal had been made (SA. 29, 30, 284-286).

"Although the evidence is not free from conflict, we are convinced that it furnishes ample support for the findings made by the special master, relevant portions of which are:

'92. Prior to February 10, 1950, GM&O had no knowledge or information that the government was giving Harrison Street property consideration more favorable than it was giving other Chicago sites proposed for acquisition by the government.

'97. Subsequent to February 10, 1950, and the acquisition by GM&O of plaintiffs' Joliet stock, GM&O continued its negotiations with the U.S. government authorities in its effort to sell the Harrison Street properties to the government. The negotiations continued with no definite commitment made by the government until October 5, 1950 when the government informed GM&O that it intended to acquire the Harrison Street property and would acquire it by condemnation if negotiation did not result in an agreement on the price to be paid.

* * * * *

'112. The correspondence between government officials contained in Defendant's Exhibit D-32 indicates that as of April, 1950, they still had not come to any decision to purchase the Harrison Street property and that they were giving serious consideration to seven other sites in Chicago as suitable for purchase for Post Office use; that as late as June 7, 1950, they were giving consideration to sites offered by the Santa Fe Railroad and by a Mr. Tucker.

'115. Sale of the Harrison Street properties to the government was not assured until October 5, 1950, when the government representatives informed GM&O that the government had decided to acquire the property, either by negotiation or condemnation.'" (Opinion, p. 7)

the contrary. On February 10, 1950, when Petitioners' offer to sell their Joliet stock was accepted, neither Gulf nor the government knew or could have known that the government, in the fall of 1950, would select the Harrison Street property as the site for the post office facilities. Moreover, the appraisal of the property had not yet been received. When it was received and used as the basis of the offer made by Gulf to the government in April, 1950, the amount was far above the eventual price agreed upon in 1951 (SA. 30, 256, 261, 338). The testimony of Mr. F. M. Hicks, the Executive Vice President of Gulf, was that "*We didn't know of it at the time* but as developments proved later on, we were able to take a loss for income tax purposes because we sold the property at less than its cost. Naturally we took an income tax deduction but that did not come along until 1951" (Hicks Deposition, p. 160).[1] Moreover, the tax deduction merely reduced the loss to Gulf; if the price for the property had turned out to be about the recorded cost, there would have been no tax deduction, and yet Gulf would have received more money for the property.

Similarly, Petitioners' claim that the dissolution of Joliet was motivated by an effort to obtain a tax deduction is contrary to the evidence. As early as 1947 Gulf had publicly announced its intention to bring about this dissolution. Gulf's 1947 application to the Interstate Commerce Commission stated that it intended to acquire all the stock of Joliet (and of another leased line) and, upon such acquisition, to cancel the leases and dissolve those corporations (SA. 295-297). The desirability of eliminating the multiple corporations had been suggested by Judge Barnes in his opinion approving the reorganization plan of the Alton (SA. 347). The Commission's decision in 1947 stated that "If the ultimate object of acquiring all the stock is attained,

1. Emphasis supplied in all quotations in this brief.

the applicant [Gulf] will be able to terminate the leases and dissolve the corporations with a resulting simplification of its corporate structure" (SA. 345). The determinations of the courts below as to the purposes of Gulf and of its lack of knowledge of the facts which Petitioners would attribute to it are firmly grounded upon the evidence. Most of those alleged facts, indeed, were completely nonexistent.

Prior to Petitioners' sale of their Joliet stock, representatives of Petitioners and representatives of Gulf independently estimated the maximum price per share that Gulf could afford to pay for that stock, and the results of the calculations were substantially identical. Mr. Harold Gardner, who is a lawyer skilled in the matter of purchases and sales of leased line securities, represented most of the Petitioners in the sale of their Joliet stock (SA. 118 *et seq.*). He was the one who set the offering price at $240, consisting of $225 plus the accrued dividends of $14 and plus a $1 fee to the broker. In so doing, he testified that he had calculated that the value to Gulf of eliminating the Joliet was $260-plus, per share (SA. 176). Gulf's representatives came to the same conclusion independently, calculating that the maximum Gulf could afford to pay was $244 plus the $14 accrued dividends (SA. 52-53). Thus Petitioners' calculations were substantially identical with those of Gulf, further confirming the findings of the courts below that Petitioners were in possession of all the material facts.

ARGUMENT

Petitioners' statement of the questions presented (Pet. 14-15) involves several erroneous assumptions of fact. The essential question on this petition for writ of certiorari may be stated as follows: "Where no misrepresentation was charged, and where both courts below have found (a) that Gulf concealed no material facts, and (b) that Petitioners were in possession of all material facts when they sold their Joliet stock and on the basis of these findings; (c) that Gulf did not violate the S.E.C. Regulations, should this Court review the detailed evidence upon which those determinations were made?"

I. The Decision in this Case Is Not in Conflict with the Decisions Cited by Petitioners.

(a) *La Buy* v. *Howes Leather Co.*, 352 U.S. 249.

In *La Buy*, both parties objected to the entry of an order which referred a matter to a special master and both parties moved to vacate that order. Having made its position clear, one of the parties obtained from the Court of Appeals for the Seventh Circuit a writ of mandamus ordering the District Court to hear the case without a master. This Court affirmed.

As that same Court of Appeals held in this case, the facts here are quite different. The Court of Appeals stated:

> "The court of its own volition referred the case to a special master. Plaintiffs argue that the reference was improper and that the entire cost of the reference should be borne by defendant. There may be a question as to whether this was a proper case for reference, but on the record we cannot hold that the action of the court was erroneous. Plaintiffs state that in open court on more than one occasion they objected to the

reference. This appears to be an overstatement because at no point did they object. The most that can be said is that counsel indicated a preference for a court trial, although conceding that it might properly be referred on the issue of damages. No question is raised but that the fees which the court fixed for the special master are reasonable. Under the circumstances, we would not be justified in altering or modifying the decree as it relates to costs." (Opinion, pp. 13-14)

While Petitioners indicated, at most, a preference for a court trial, they did not object, and did absolutely nothing to apprise the court or Gulf that they were challenging or might later challenge the reference. Instead, Petitioners merely asked the District Court for the name of the master and then, after the Court named the master (A. 173), Petitioners proceeded to submit their evidence and brief to the master, showing their complete acquiescence in that procedure. It would be harmful to the administration of justice and unfair to the other party if a litigant, having so acquiesced and proceeded before the master, were thereafter to be permitted to challenge the order of reference by retroactive objection after rendition of a master's report unfavorable to him. The decision of the Court of Appeals in the *La Buy* case was issued on October 13, 1955, and the decision of this Court, affirming that ruling, was issued on January 14, 1957, substantially before the date (March 6, 1957) when the District Court referred this case to a master, yet Petitioners elected to make no objection, motion to vacate or application for mandamus. Thus, even if the District Court had exceeded the limits of its discretion in referring this matter to a master (which is not conceded), Petitioners' belated objection to the reference provides no basis for an attack upon the judgment. The decision is wholly consistent with *La Buy*.

One other point is noteworthy in this connection. In the Court of Appeals Petitioners did not ask to have the judgment reversed an account of the reference. Instead, what they there sought was to have that court shift the costs of the reference to Gulf, which had prevailed on the merits. The Summary of Argument in their brief stated, as to this point:

> "This case should not have been referred to a Master; having been so referred on the basis of defendant's erroneous representations as to the length of trial, the entire cost of the reference should be charged to it."

The District Court had indicated from the outset that it thought the case was a proper one for reference (A. 170). Subsequently, during a discussion as to setting the case for trial, counsel for Gulf estimated that the trial would take a week, and that the preparatory work which still remained "will have the effect of actually holding down the amount of time that will be necessary for the presentation of the case itself" (A. 172). While the oral hearing before the master took only two days, comprising 287 pages of transcript, depositions were introduced at the hearing without being read, containing 517 pages of transcript, together with 74 exhibits of 566 pages (Sum. 2, A. 5). Had the depositions been read in court, conformable to the usual practice, the time consumed would have been at least three to four days more. The depositions were received in evidence by agreement of the parties, the Special Master having stated that he had read them and was familiar with them. Clearly a court hearing with depositions, oral hearing, exhibits, pleadings and briefs aggregating 1639 pages (Sum. 2, A. 5) would have taken more than a week, without allowance for other court matters that necessarily occupy part of the court time.

(b) *Speed* v. *Transamerica Corp.*, 235 F. 2d 369.

The rule of law under which the Court of Appeals for the Third Circuit proceeded in the *Speed* case was exactly the same as the one on which this case was decided. The Petition, at page 21, quotes from the *Speed* opinion as follows:

> "The rule is clear. It is unlawful for an insider, such as a majority stockholder, to purchase the stock of minority stockholders without disclosing material facts affecting the value of the stock, known to the majority stockholder by virtue of his inside position but not known to the selling minority stockholders, which information would have affected the judgment of the sellers."

The opinion in the present case stated and gave effect to the same rule (Opinion, pp. 6, 8). The Court of Appeals pointed out, however, that the factual situation here was sharply different from the facts in the *Speed* case (Opinion, pp. 9, 13).

As the Court noted, in *Speed* there had been a huge increase in value of the readily salable tobacco inventory before the minority stock was purchased. The information as to that increase over the book value, together with the intention of the majority stockholder to obtain that increase by liquidating the corporation, was a material fact which was not divulged to the sellers. Here, in contrast, there was no increase at all over the book values and, when the eventual sale took place of the portions of the Harrison Street property that had formerly been under the Joliet lease, the price was substantially less than the book value.

Moreover, the Court of Appeals pointed out that the circumstances here regarding the effects of the perpetual lease

as limiting the Joliet stockholders to a $7 per year payment in perpetuity were not at all present in *Speed* (Opinion, p. 13). The Court noted that if the *Speed* plaintiffs had not sold their stock, "as full equity owners of the property they would have been entitled to share in the proceeds of the sale or in the reinvestment thereof. In contrast, plaintiffs as shareholders in Joliet had no right to share in the proceeds of the sale by Gulf to the government or in any income derived from the investment of such proceeds" (Opinion, p. 13).

In the lack of any increase of values over the book values, lack of any assured sale of any part of the property involved, and the lease limitations upon the rights of the stockholders, the facts here were totally different from those in the *Speed* case. In both cases the same rule of law was applied to test the conduct of the majority stockholder and the difference in result was due solely to the sharp difference in facts.

In discussing the *Speed* case, Petitioners make several statements as to supposed facts and factual inferences in this case (Pet. 22, 23) which, as we have pointed out in the Statement of the Case, bear no resemblance either to the factual determinations of the lower courts or to the evidence. This is not even a matter where the evidence might have permitted the trial court to make the factual determinations sought by Petitioners. Here the evidence directly negatived Petitioners' theory of the facts. It is simply not true that in February, 1950, when Petitioners sold their stock, the sale of the Harrison Street property was "approaching consummation" or that the sale, when made in 1951, was at a profit, or that the government had made an offer for the property or that Gulf knew that the sale would be made at a deductible loss, or that it would be made at all or that the sale could not have been made with-

out the consent of each Joliet stockholder. Petitioners' extreme statements serve only to emphasize the soundness of the decision of the Court of Appeals that, on the facts of this case, the decision of the District Court was in no way in conflict with the *Speed* case.

(c) *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 206 F.2d 495

The Western Pacific case involved a known tax loss of one subsidiary corporation which was used in a consolidated corporate tax return as a deduction against system revenue. The decision denied a claim by a stockholder of the subsidiary corporation that the parent corporation was liable to pay something to the subsidiary for having so filed the consolidated return. There is neither a resemblance between the facts of that case and the facts here, nor any conflict in the decisions.

The portion of the Petition which discusses that decision is replete with erroneous statements as to the facts of this case. For example, evidently in an effort to show that there was a known tax loss (called by Petitioners a "hidden tax windfall") at the time when Petitioners sold their stock, they say that "Gulf knew on February 10, 1950 that by acquiring all Joliet's stock and dissolving Joliet before consummating the sale, it would acquire a tax loss of about two and a half million dollars, which would be realized as soon as it completed the sale" (Pet. 27). As we have pointed out in the Statement of Facts, pages 11-13, *supra*, both the findings of fact and the evidence were directly to the contrary.

No one knew at that time that there would ever be a tax deduction at all. The government had not decided to select this site and, instead, was actively looking for other sites;

the appraisal being made for Gulf had not yet been received, and, when it was received, was for an amount about two millon dollars more than the ultimate price. The tax loss arose through the government's decision to select this site, a decision which was not made until October, 1950, followed by reappraisals by both the government and Gulf and negotiations which eventually led, in 1951, to the sale at a reduced price which created the deductible loss. The master's report summarizes the testimony in this respect as follows: "At the time GM&O was acquiring the stock, GM&O did not know that GM&O would be able to take the loss for income tax purpo s that was actually taken after the sale in 1951" (Sum. 212, A. 75). There is no evidence to the contrary.

Moreover, the deductibility for income tax purposes merely reduced the extent of the loss on the sale. Had Gulf been successful in its effort to sell the Harrison Street property for its book value, there would have been no tax loss and yet the net amount received by Gulf for the property would have been more than the net amount, after taxes, that was actually received. The courts below properly rejected Petitioners' effort to have them infer, contrary to the evidence, that Gulf acquired the remaining Joliet shares and dissolved Joliet for the purpose of creating or obtaining a tax loss.

(d) *Dunnett* v. *Arn*, 71 F. 2d 912; *Hughes* v. *Securities and Exchange Commission*, 139 F. 2d 434; *Norris & Hirshberg, Inc.* v. *Securities & Exchange Commission*, 177 F. 2d 228

Petitioners' citation of these cases is based upon their incorrect statement that "The court below evidently assumed that the fiduciary standard required of Gulf here was fixed by the law of Illinois * * *" (Pet. 28).

The reason for the discussion of the Illinois cases by the Court of Appeals was that, of the two counts in the complaint, one was predicated on diversity of citizenship and charged fraud based on the common law of Illinois. The other charged a violation of Rule X-10B-5 of the S.E.C., under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. 78j(b). In their brief to the Court of Appeals, Petitioners stated: "It is not believed that there is any substantial difference between present Illinois law and Federal law on this subject * * *" (p. 21).

The decision below considered both counts of the complaint, discussed both the Illinois cases and the federal cases (including the cases involving Rule X-10B-5) and held that Gulf had violated neither its common law obligation nor the obligation created by Rule X-10B-5. There was no holding that Illinois law superseded federal law or that the federal law would not be given "paramount effect." Instead, there was an express holding (quoted at page 2, *supra*) that Gulf had not violated that federal rule and a holding that Petitioners "are not entitled to recover under" either of the two causes of action stated in the complaint (A. 153, 163, 164). These determinations were based upon the finding that "defendant concealed no material facts from the plaintiffs and plaintiffs were in the possession of all the facts relevant to a determination of the fair value of the stock" (A. 151-152, 163, 164).

(e) *Alton Plan of Reorganization*

The Court of Appeals pointed out that, unlike stockholders in an ordinary company, the stockholders here lacked all proprietary interest in Joliet "by reason of the fact that by the lease all of Joliet's property was demised in perpetuity" (Opinion, p. 10). In the course of its discussion on this point, the Court approved the finding and

conclusion that the $7 dividend payable on Joliet stock would "not be affected in any way as a result of a sale or other disposal of Joliet's interest in the Harrison Street properties" and that "Joliet stockholders, in the event of a sale of part of Joliet's property during the term of the lease, would derive no benefit from such a sale, even though made at a great profit, because their dividend was limited to $7 per share" (Opinion, p. 11). After noting that the testimony of both parties was to this effect, the Court concluded that the situation of shareholders of Joliet was in marked contrast to shareholders in the ordinary case (Opinion, p. 12).

In the course of this discussion the Court referred to the fact that the lease in perpetuity had previously been referred to, both by the Court of Appeals and by the Supreme Court of Illinois, as having vested title in Gulf. The Court then referred to a provision in the lease assumption agreement of 1947 that the lease should be deemed a lease and not a conveyance in fee. This is the provision of the Alton Plan of Reorganization which, say Petitioners, conflicts with the decision. However, after saying that it is not discernible how that provision altered the situation, the Court of Appeals said:

> "*In any event,* Joliet stockholders still were entitled to receive $7.00 per share annually and nothing more." (Opinion, p. 11)

Thus, as the Court of Appeals indicated, it made no difference for the purposes of this case whether the lease be deemed a perpetual lease or a fee. In either event, the rights of the Joliet stockholders, unlike the rights of stock-

holders in the ordinary company, were limited to the receipt of $7 per year.[1]

That the Court of Appeals was not resting its decision on the principle that the lease conveyed a fee is further shown by the fact that the opinion went on to consider the effect of "the remote possibility that the leasehold property might revert to Joliet" and to consider, in that connection, various decisions as to reversions after long-term leases (Opinion, p. 12).

Plainly, the decision in no way conflicts with the Alton Plan of Reorganization.

II. The Decision Does Not "Conflict with the Unmistakable Trend of the Decisions of All the Federal Courts in This Century."

Under the comprehensive claim quoted in the caption above, Petitioners express at length their disagreement with the findings of fact below and with much of the testimony and exhibits on which the findings were based (Pet. 32-50). Petitioners accuse the Court of Appeals of "unusual blindness" (Pet. 32); charge the master and the court below with "clear error" in the findings of fact (Pet. 47); and say that the courts were "naive" in accepting the master's finding as to certain facts (Pet. 50).

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1. In an opinion by Judge Swan, for a three-judge District Court, in a case concerning the fair value of leased line stocks where the leases were for long terms, the court said: "We agree with the [Interstate Commerce] Commission's statement that 'For all practical purposes, the stocks of the leased lines have a value to their owners measurable solely by the fixed rental payable under the leases and the dividends payable therefrom on the stocks.'" This Court affirmed that decision, *per curiam*, on March 30, 1959. *Friedman* v. *United States*, 168 F. Supp. 815, 339 U.S. 205.

A Master in Chancery, a District Court judge and three judges of the Court of Appeals have unanimously agreed that there is no factual basis for Petitioners' charges. Petitioners' theory would call for a conclusion, completely without support, that several of the witnesses committed perjury. We cannot set out the pertinent evidence and findings in detail in this brief, but the master's report, by summary of the evidence, shows that the record fully supports the findings below (A. 30-153). This Court has long held that it will not issue a writ of certiorari to provide a further review of the factual issues of a particular case, especially where both the District Court and the Court of Appeals have arrived at the same conclusion.

As to Petitioners' argument about the effect on them of Gulf's contest of liability (as lessee) to pay Joliet's income taxes, and the resulting accruals of dividends on Joliet stock, the opinion shows that the Court of Appeals fully reviewed the circumstances. The Court discussed the point for almost all of page 5 and part of page 6 of the opinion, and concluded by approving the conclusion below that those matters "had no effect upon plaintiffs' judgment when plaintiffs sold their Joliet stock in February, 1950, and plaintiffs were fully informed as to such matters before they sold their stock."

Gulf's right to contest liability for those taxes had been expressly stated as a provision both of the Alton reorganization plan and of the lease assumption agreement approved by the I.C.C. and by the District Court and executed in 1947. In the tax litigation the District Court in 1949 held that Gulf was obligated to pay those taxes, but there was no holding, as Petitioners seem to claim, that Gulf

somehow had lost the right to contest that liability. The evidence shows that the purchase price which Petitioners demanded and received for their stock in February, 1950 ($240) included all dividends ($14) which had accrued during that contest. It also shows that the price had not been depressed by the existence of the tax controversy. In the summer of 1947, "The Joliet stock was selling on the New York stock exchange at a bid price of approximately $125 a share" (Sum. 132, A. 54). On August 25, 1947, Gulf applied to the Interstate Commerce Commission for authority to acquire Joliet shares for the purpose of terminating the lease and stated its position that it was not obligated to pay the Joliet income taxes (Sum. 127-130, A. 52-54). All but two of the Petitioners bought their Joliet stock in the period from September, 1947, to January, 1949, their purchases being at prices between $145 and $159 per share (SA. 331-333). Their sale price of $240 in February, 1950, gave them a large profit. Among the findings were the following:

> "44. The assumption agreement specifically reserved GM&O's right to litigate the question of its liability for payment of Joliet's income taxes, and GM&O made no agreement in 1945 or subsequently, to pay such taxes until such time as it was judicially determined to be liable therefor under the lease.
>
> "45. The plaintiffs contended that GM&O's refusal to pay Joliet's 1946 income tax, and its making public that decision in December, 1947, was intended to discourage Joliet stockholders from continuing to hold their stock, to encourage them to accept GM&O's exchange offer and to depress the market value of Joliet stock.
>
> "46. Whether such was GM&O's intention is irrelevant since the facts show that no such consequences resulted from defendant's conduct." (A. 128)

At page 39 the Petition says that "Gulf's frantic haste in making the Joliet stock purchases proves that it was an emergency matter," and elsewhere the Petition also refers to the same claim of "extraordinary emergency action" (Pet. 42). The record shows that there was no haste at all with the sole exception of the fact that Petitioners themselves, when they offered their shares for sale, set a five-day time limit, and their offer was accepted within the short period which *they* had fixed (A. 57, SA. 114-116). An offer was then made for the purchase of the shares of the remaining Joliet shareholders and, within the next two months, the others accepted.

Similarly, Petitioners say that "defendant's 'long-range plan' for Joliet had been to starve the minority into submission by an indefinite suspension of dividend payments" (Pet. 39). There is not a word of evidence to support such an allegation; this appears to be merely Petitioners' way of saying that Gulf, pursuant to the Alton plan of reorganization and the lease assumption agreement, contested liability for Joliet's income taxes.

A characteristic of Petitioners' discussion, illustrating the nature of their attack upon the findings of fact, is their repeated statement that some supposed circumstance "must have been" the fact. Thus Gulf "must have been apprised" of certain considerations (Pet. 41), neither of which was developed in the evidence. Mr. Hicks "must have felt quite hopeful" and his hopes "must have risen far higher" (Pet. 45). Certain considerations as to title to a portion of the Harrison Street property "must have occurred to some one," and a talk "must have taken place" before a certain time (Pet. 49). A decision of this Court relating to capital gains tax on a taxable gain of corporate property "must surely have caught their attention" as to

a tax loss (Pet. 49), although no tax loss occurred until a year later. Such suppositions do not take the place of evidence and the evidence was contrary to the suppositions.

Others of Petitioners' statements, some of which were noted in our Statement of Facts at pages 8, 9, 11 and 12, *supra*, are in the form of flat statements of fact as if the evidence and findings had been to that effect, although the statements merely represent Petitioners' attack on the findings.

Petitioners' inference that Mr. Hodes found out from the Postmaster General or some other government official the contents of an internal Post Office report of December, 1949, favoring the Harrison Street site is contrary to the testimony of Mr. Hodes (Sum. 309, A. 113) and contrary to the findings of fact (Finding 91, A. 140). The statement that in January, 1950, "a very quick closing was expected" (Pet. 41) also is contrary to the evidence and findings of fact (Finding 92, A. 140). The statement that "When Gulf first dealt with the Post Office Department, it described the whole property as its own" (Pet. 48) is in sharp contrast to the evidence, which was that "At that time [December 1, 1949], GM&O told the Post Office representatives that certain of the properties were owned by Joliet and certain of the properties were owned by GM&O, but they raised no question as to what kind of title GM&O would give" (Sum. 178, A. 66). The statement that in lat January, 1950, "Gulf determined that the closing must be deferred till 1951" (Pet. 44) and the allegations that the purpose of Gulf's acquisition of Joliet stock and dissolution of Joliet was to obtain a clear title to part of the Harrison Street property and to obtain a "potential tax bonanza" (Pet. 49) are similarly contrary to the evidence and findings of fact (Findings 91, 92, 93, 97, 105, 106; A. 140, 142, 144). The various assertions and suppositions

of petitioners were all reviewed by the courts below and, in the light of the evidence, were properly rejected.

CONCLUSION

The decision conflicts with none of the decisions referred to in the Petition and involves no important question of federal law. Petitioners' contentions resolve themselves into objections to the findings of fact in this particular case, and, both courts below being in agreement, the petition for writ of certiorari should be denied.

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